IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRADLEY ALVERSON, Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiff,	§	**Civil Action No.: 5:16-cv-00849**
v.	§	**JURY TRIAL DEMANDED**
BL RESTAURANT OPERATIONS LLC d/b/a BAR LOUIE,	§	
Defendant.	§	

DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(C) AND INCORPORATED MEMORANDUM

Defendant BL Restaurant Operations LLC d/b/a Bar Louie ("BL Restaurant" or "Defendant") moves for partial judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for the following reasons:

I. INTRODUCTION

Plaintiffs' First Amended Complaint alleges that BL Restaurant failed to pay them and "similarly situated" employees, bartenders and servers, minimum wages in violation of the Fair Labor Standards Act ("FLSA"). The FLSA permits an employer to take a tip credit toward the minimum wage for a tipped employees such as a bartender or server, and thereby pay that employee below the minimum wage for each hour worked. The employee then retains his or her tips in addition to the hourly wage that the employer pays the employee. Plaintiffs allege that they spent "more than 20% if their time at work engaged in non-tipped side work related to the tipped profession" in violation of the FLSA. (Doc. 16, ¶ 3). Plaintiffs further allege they should not have been paid the tip-credit rate when performing "non-tipped side work unrelated to the tipped profession." (Doc. 16, ¶ 3).

Plaintiffs' allegation that BL Restaurant violated the FLSA by requiring tipped employees to spend more than 20% of their time at work engaged in non-tipped side work related to the tipped profession is not supported by the relevant law. The FLSA is clear, employers are entitled to a tip credit for employees engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips. Plaintiffs do not allege that BL Restaurant does not meet this requirement. Plaintiffs rely instead on nonbinding provisions of the Department of Labor ("DOL") Field Operations Handbook ("Handbook" or "DOL Handbook") stating that no tip credit may be taken when greater than 20% of an employee's time is spent on non-tipped side work. Courts construing this provision have rejected as infeasible and have declined to afford it deference.

Plaintiffs also claim that BL Restaurant required Plaintiffs to perform duties unrelated and not incidental to their tipped occupations, bartender and server, that rendered Plaintiffs' occupation a "dual job." Plaintiffs contend they are entitled to the difference between minimum wage and the tipped minimum wage for time spent performing the non-tipped occupation. The specific tasks Plaintiffs allege are unrelated to tip producing activities, including sweeping, cleaning bathrooms, washing dishes, cleaning out coolers, polishing, mopping, cleaning bar mats, stocking liquor and wine, stocking plates and glasses, cutting fruit, making simple syrup and cleaning/dusting shelves. (Doc. 16, ¶ 26, 34). The specific tasks Plaintiffs allege are unrelated to tip producing activities are precisely the type of tasks that have been held to be directly related to Plaintiffs' positions of bartender and server – and are incidental to the tipped occupation rather than a dual job as Plaintiffs suggest. As such, Plaintiffs have failed to allege a valid claim for relief and the "80/20" theory should be dismissed.

II. BACKGROUND

On August 26, 2016, Plaintiff Bradley Alverson, a bartender at Defendant's San Antonio, Texas Bar Louie Restaurant, brought a collective action to recover allegedly unpaid wages and misappropriated tips owed to him and other similarly situated current and former employees. (Doc. 16, ¶ 5). The crux of Plaintiff Alverson's complaint is that BL Restaurant required its tipped employees to share tips with ineligible employees and deducted more than the actual costs of credit card fees on tips paid pursuant to credit card transactions in violation of the FLSA. *Id.*

On April 20, 2017, Plaintiff Alverson filed a First Amended Complaint adding Plaintiff Casey Howie, a former server and bartender at Defendant's Pittsburg, Pennsylvania Bar Louie Restaurant. The First Amended Complaint for the first time raised new alleged FLSA violations. Specifically, Plaintiffs allege that BL Restaurant maintained a policy and practice whereby tipped employees were required to spend more than 20% of their time allegedly performing non-tip producing side work unrelated to the employees' tipped occupation. (Doc. 16, ¶ 3). This side work included cleaning the restaurant, preparing food in bulk, cutting produce, refilling condiments, and stocking and replenishing the bar and service areas. (Doc. 16, ¶ 27, 28). Plaintiffs contend they were required to perform these duties at the start and end of every shift, in excess of two hours and more than 20% of their work time. (Doc. 16, ¶ 29, 30). Accordingly, Plaintiffs claim they are entitled to the difference between the hourly wage paid and minimum wage for the periods of time Plaintiffs performed any non-tipped work in excess of 20% of their work time. (Doc. 16, ¶ 76).

Plaintiffs further contend that BL Restaurant required Plaintiffs to perform duties unrelated and not incidental to their tipped occupations, bartender and server, that rendered Plaintiffs' occupation a "dual job." The specific tasks Plaintiffs allege are unrelated to tip-producing activities include sweeping, cleaning bathrooms, washing dishes, cleaning out coolers, polishing, mopping, cleaning bar mats, stocking liquor and wine, stocking plates and glasses, cutting fruit, making simple syrup and cleaning/dusting shelves. (Doc. 16, ¶ 26, 34). Plaintiffs contend that they are entitled to the difference between wages paid and the minimum wage for any time spent performing tasks unrelated to tip-producing activities. (Doc. 16, ¶ 77).

III. STANDARD OF REVIEW

Rule 12(c) provides that "any party may move for judgment on the pleadings after the pleadings are closed." *Hughes v. The Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001) (citing Fed. R. Civ. P. 12(c)). A Rule 12(c) motion for judgment on the pleading is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (per curiam) (citing 5A Wright & Miller, Federal Practice and Procedure § 1367, at 509-10 (1990)). The legal standard for dismissal under Rule 12(c) is the same as the legal standard for dismissal under Rule 12(b)(6). *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). The primary focus is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002).

IV. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Allegation that Defendant Violated the FLSA by Requiring Tipped Employees to Spend more than 20% of their Time at Work Engaged in Non-Tipped Side Work Related to the Tipped Profession is not Supported by the Relevant Law.

Plaintiffs allege that BL Restaurant maintained a policy and practice whereby tipped employees were required to spend a substantial amount of time, more than 20%, performing non-tip producing side work related to the employees' tipped occupation. (Doc. 16, ¶ 3). Plaintiffs contend they were required to perform these duties at the start and end of every shift, in excess of two hours and more than 20% of their work time. (Doc. 16, ¶ 29, 30). As a result, Plaintiffs allege that BL Restaurant improperly took a tip credit for the time Plaintiffs spent performing this side work. There is, however, no federal statute, federal regulation, or binding case law that prohibits an employer from taking a tip credit when an employee performs side work in excess of 20% of the tipped employee's work time.

1. Plaintiffs' employment with BL Restaurant qualifies for a tip credit under the FLSA because plaintiffs, as bartenders and servers, are engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

Nothing in the FLSA or the applicable Department of Labor regulations requires BL Restaurant to pay Plaintiffs the full minimum wage for the time allegedly spent on non-tipped work related to Plaintiffs' tipped occupation. A covered employer is required to pay its employees a minimum "wage" in an amount set forth in Section 206 of the FLSA—currently $7.25 per hour. 29 U.S.C. § 206(a). Section 203 of the FLSA defines "wage" and establishes the tip credit for tipped employees. 29 U.S.C. § 203(m). The tip credit is available to any employee so long as he is engaged in an "occupation" where he customarily and regularly receives $30 a month in tips; it does not require that the duties of the "occupation" consist of a certain percentage of tip producing duties and non-tip producing duties. 29 U.S.C. § 203(m), (t). Thus, the only requirement under the FLSA is that the employee be engaged in an "occupation" where he regularly receives $30 a month in tips. There is no allegation this standard was not met here.

The Department of Labor regulations addressing tipped employment likewise do not contain a limit on the amount of time an employee can perform non-tip producing duties or side work related to his tipped occupation. *See* 29 C.F.R. §§ 531.50-.60. The specific regulation pertinent here is 29 C.F.R. § 531.56(e), entitled "Dual Jobs." Under this regulation, where an employee is engaged in two separate occupations, one tipped and one not tipped, the employer may take a tip credit only for the tipped occupation. The focus of the regulation is again on the employee's *occupation*. The examples DOL uses in the regulation are instructive, as they distinguish between two very different scenarios. The first scenario is where an employee holds two clearly distinct, non-overlapping roles—a hotel maintenance man and a waiter in the hotel restaurant. The tip credit may only be applied when working in the tipped occupation. The regulation distinguishes this from the second scenario, where tipped employees in the course of their tipped occupation happen to perform tasks that are not themselves tip generating, but "related duties," in which case the tip credit may be taken. *Id.* ("related duties in an *occupation* that is a tipped occupation need not by themselves be directed toward producing tips") (emphasis added). 29 C.F.R. § 531.56(e).

Both the statute and the regulations focus not on the employee's time performing specific duties or tasks, but instead on the employee's *occupation as a whole*. The mix of an employee's duties *within* a tipped occupation do not affect whether or not he or she is a tipped employee.[1] Therefore, Plaintiffs' claim that BL Restaurant improperly took a tip credit for the time spent performing non-tip producing side work related to their tipped occupation is not support by the plain language of the FLSA and applicable DOL regulations warranting dismissal

2. Plaintiffs rely on nonbinding provisions of the DOL Handbook which Courts have rejected as infeasible.

Plaintiffs' theory of recovery relies on non-binding provisions of the DOL Handbook setting out the 20% limitation on performing non-tipped side work. The original provision of the

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[1] This distinction is logical. Attorneys make copies, and may spend vast amounts of time performing clerical like functions. But an attorneys' "occupation" is being an attorney, and an arbitrary amount of time spent performing clerical tasks related to the occupation of an attorney does not somehow transform the "occupation" into a dual job.

DOL Handbook stated, “where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” U.S. Department of Labor, Wage and Hour Division, FIELD OPERATIONS HANDBOOK § 30d00(e) (Dec. 9, 1988).[2] This language has become the basis for the manufacturing of a new cause of action against restaurateurs already saddled with confounding regulations regarding tipped employees.

This provision was so unworkable and confusing that DOL abandoned it in a 2009 opinion letter. In the opinion letter, DOL stated the Handbook created “confusion and inconsistent application” and explained that the 20% limit does not apply to related duties of a server and clarified that “[w]e do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, as long as they are performed contemporaneously with direct customer service duties and all other requirements of the [FLSA] are met.” DOL Opn. Ltr. FLSA 2009-23, Jan. 16, 2009, 2009 DOLWH LEXIS 27. The opinion letter further explained that so long as the duties performed by the employees are part of their tipped occupation employees are not engaged in “dual jobs.” Further, the DOL stated, “these principles *supersede* our statements in Handbook § 30d00(e),” and that “a revised [Handbook] statement will be forthcoming.” *Id.* (emphasis added).

Adding to the confusion, on March 2, 2009, the January 16, 2009 Opinion letter DOL had just issued, was withdrawn. The Obama Administration withdrew it stating that although the Acting Wage and Hour Administrator under the Bush Administration signed the Opinion Letter prior to leaving office, it had not been mailed, so it was being withdrawn for “further consideration." See 2009 DOLWHL LEXIS 27. The DOL has not issued any further opinion letters on the subject.[3]

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[2] In 1988, the DOL added this sentence to section 300d00(e) of the Handbook without prior notice to the public or comment.

Moreover, a number of courts that have addressed the 20% limitation in the DOL Handbook have found its application to be infeasible. For example, in *Pellon v. Business Representation International, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff'd,* 291 Fed.

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[3] The DOL revised § 30d00 of the Handbook on November 17, 2016, expanding the provision addressing tipped employees engaged in dual jobs. The revisions distinguish between non-tipped side work related to the tipped profession and work unrelated to the tipped profession. The DOL Handbook states in pertinent part:

> (1) When an individual is employed in a tipped occupation and a non-tipped occupation, for example, as a server and janitor (dual jobs), the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30.00 a month in tips. *See* 29 CFR 531.56(e)
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> (2) Reg. 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses.
>
> (3) However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.
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> (4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

Department of Labor, Wage & Hour Division, *Field Operations Handbook* § 30d00(f) (November 17, 2016).

Appx. 310 (11th Cir. 2008) the Court rejected the DOL's entire analysis as unworkable and inappropriate. In *Pellon,* the court considered airport skycaps who argued that they should have been paid full minimum wage for certain tasks that they contended did not produce tips. The court rejected that contention. *Pellon,* 528 F. Supp. 2d at 1314. Addressing the practical problems inherent in trying to apply DOL's 20% standard from the Handbook, the court held a "determination whether 20% (or any other amount) of a skycap's time is spent on non-tipped duties is infeasible" and "permitting Plaintiffs to scrutinize every day minute by minute, attempt to differentiate what qualifies as tipped activity and what does not, and adjust their wage accordingly would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit for employers." *Id.* at 1313-14. The court went on to note, "[o]f greater concern is the fact that under the reasoning proffered by Plaintiffs, nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Id.* The Eleventh Circuit affirmed summary judgment in favor of the employer "on the basis of the district court's well-reasoned order." 291 Fed. Appx. 310-311. *See also, Richardson v. Mountain Range Rests. LLC*, 14- CV-1370, 2015 WL 1279237, at *6 (D. Ariz. Mar. 20, 2015) ("[r]egardless of the frequency with which non-tipped work was assigned, no minimum wage claim is stated against [Defendants] unless [Plaintiffs'] average wage for the workweek, including tips, fall below the minimum wage"); *Hart v. Crab Addison, Inc.*, No. 13-CV-6458, 2014 WL 2865899, at *11 (W.D.N.Y. June 24, 2014) (servers did not state a FLSA claim based on their allegations that they engaged in non-tipped duties more than 20% of their shift).

Plaintiffs' First Amended Complaint demonstrates the infeasible nature of the DOL's 20% limitation. Plaintiffs describe the "side work" duties as "general cleaning of the restaurant, preparing food in bulk for customers, cutting produce, refilling condiments, and stocking and replenishing the bar and service areas." (*see* Doc. 16, ¶ 28). Plaintiffs' claims would require tipped employees to clock in and out dozens or hundreds of times per day to register the transition from one type of task to another. Requiring a server to clock out while they set a table and then clock back in as a dish is served ignores the reality of the "occupation" of being a server. Congress was surely aware of practices in the restaurant industry when it first authorized the tip credit for employees in tipped occupations. The idea that Congress would impose such a monstrous record-keeping obligation on restaurants or their employees is unsupported, as is the view that in enacting the tip credit provision in the FLSA Congress somehow intended to radically alter the job duties of millions of restaurant workers across the country or to put courts in the role of micro-managing every aspect of tipped employment in restaurants task-by-task. Yet allowing Plaintiff's claim to proceed invites exactly that kind of absurd result.

Notably, the Fifth Circuit has not recognized that this kind of claim is cognizable under the FLSA and there is no basis in the statute to allow Plaintiffs claim on this 20% theory to proceed. Accordingly, BL Restaurant request the Court dismiss Plaintiffs' minimum wage claims to the extent it relies on the 20% limitation.

3. The only federal appellate court to directly consider the issue inappropriately afforded controlling deference to the DOL Handbook.

The DOL Handbook consists of "internal directives to its employees" and accordingly is without the effect of law. *Kilinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001). Despite this proclamation, the lone federal appellate court to directly consider the issue has applied the 20% limitation on "related but nontipped duties." *Fast v. Applebee's*

International, Inc., 638 F. 3d 872, 880 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1094 (2012). In *Fast*, the court afforded section 30d00(e) of the DOL Handbook, controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The court's reliance on *Auer v. Robbins*, 519 U.S. 452 (1997) was inappropriate.[4]

Auer deference "ordinarily calls for deference to an agency's interpretation"; however, "this general rule does not apply in all cases." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (declining to accord deference to a DOL interpretation of its own regulation because, among other reasons, the agency's position had shifted over time). Deference to an agency's interpretation is "unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* (internal citations omitted). Additionally, an agency interpretation, may not be entitled to deference if the agency "provides no statutory support or reasoned explanation for [their] interpretation." *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 117 (2d Cir. 2013) (holding that a DOL regulation was not persuasive because the regulation was not supported by statute and did not contain a "reasoned explanation").

In the instance case, the DOL Handbook is not entitled to deference in the matter under *Christopher*. As the *Pellon* court discussed, the DOL Handbook's 20% limitation creates an unworkable standard, not grounded in reality or practical in the real world. The DOL Handbook merely offers a threshold percentage without considering how this standard could actually be applied in the realities of a busy restaurant, where dozens of different tasks or occupations may be performed by a tip wage employee in a matter of moments. In addition, because the DOL's

[4] The Eighth Circuit's ruling preceded the Supreme Court's *Christopher* ruling by approximately fourteen months, and thus the court did not have the benefit of the Supreme Court's subsequent refinement of its *Auer* jurisprudence rejecting deference where DOL flip-flops in its interpretations, as happened here.

position with respect to the 20% limitation has shifted over time, it should not be afforded any deference. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that an agency's interpretation of a regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view).

Moreover, the 20% limitation the DOL creates in its Handbook is not tethered to the framework of the statute and regulation it purports to interpret and thus fails under *Lundy*. Both the relevant statute, 29 U.S.C. § 203, and the relevant regulation, 29 C.F.R. § 531.56(e), base an employer's tip credit eligibility on the employee's occupation. Under the applicable regulation and statute, if the employee is engaged in a tipped occupation, the employer is statutorily entitled to a tip credit for an employee's time worked in a tipped occupation. Neither 29 U.S.C. § 203 nor 29 C.F.R. § 531.56(e) provide a temporal limitation for an employer to take a tip credit.

In contrast, the DOL Handbook's 20% limitation changes the criteria for determining tip credit eligibility from the employee's occupation to the employee's duties and tasks. This interpretation by the DOL effectively changing the criteria for application of the tip credit is not supported by the underlying statute or regulation. Moreover, the DOL does not offer a reasoned explanation from this departure from the framework established by the statute and regulation. Accordingly, pursuant to *Lundy,* the 20% limitation is not entitled to deference.

As a result, any reliance on the Eighth Circuit's decision in *Fast* to support Plaintiffs' cause of action is misplaced. Accordingly, Plaintiffs' minimum wage claims arising from the DOL's 20% limitation fail as a matter of law.

B. Plaintiffs' Claim Defendant Required Plaintiffs to Perform Duties Unrelated and not Incidental to their Tipped Occupation that Rendered Plaintiffs' Occupation a "Dual Job," is also not Supported by the Facts or Relevant Law.

Plaintiffs contend that BL Restaurant required Plaintiffs to perform duties unrelated and not incidental to their tipped occupations, bartender and server, that rendered Plaintiffs' occupation a "dual job." The specific tasks Plaintiffs allege are unrelated to tip-producing activities, including sweeping, cleaning bathrooms, washing dishes, cleaning out coolers, polishing, mopping, cleaning bar mats, stocking liquor and wine, stocking plates and glasses, cutting fruit, making simple syrup and cleaning/dusting shelves. (Doc. 16, ¶ 26, 34). The specific regulation pertinent here is again 29 C.F.R. § 531.56(e). Under this regulation, where an employee is engaged in two separate occupations, one tipped and one not tipped, the employer may take a tip credit only for the tipped occupation. This contemplates two occupations – not one occupation with overlapping job duties.

The duties complained of by Plaintiffs all fall within the scope of tip credit occupations they worked. "Servers, bartenders, and hosts—who directly related with customers—are not also employed in the second occupation of a dishwasher, cook, or janitor simply because an unspecified amount of time during their shift is spent performing those duties." *Roberts v. Apple Sauce, Inc.*, 945 F. Supp. 2d 995, 1001 (N.D. Ind. 2013). Further, duties such as cleaning the bar area, keeping the station clean, equipping the silverware trays, filling empty ice buckets, folding napkins, whether in closing side work or opening side work are incidental to producing tips and do not place that person in a dual occupation. *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360, 1367 (S.D. Fla. 2009).

A subsequent 1980 Wage and Hour Division Opinion Letter clarified that this dual job distinction is more appropriate where the facts of the case "indicated that specific employees were routinely assigned . . . maintenance-type work," not when such duties are "generally assigned to the waitress/waiter staff." W&H Opinion 1980-502, 1980 WL 141336. In other words, "the DOL recognized that duties that were related to a tipped occupation, as long as they were not assigned to just one individual and the tasks were not exclusively the province of a distinct, non-tipped occupation, constituted tipped employment." *Roberts v. Apple Sauce, Inc.*, 945 F. Supp 2d 995, 1002 (N.D. Ind. 2013). Further, the above-referenced 1980 Wage and Hour Division Opinion Letter states that time spent by tipped employees cleaning the salad bar, restocking condiments, cleaning and stocking a waitress station, cleaning and resetting tables, and vacuuming after the restaurant closed was all tipped employment within the meaning of the regulations.

In the instant case, Plaintiffs' First Amended Complaint appears to allege that certain duties—maintenance, cleaning, and stocking supplies—are *per se* unrelated to their tipped occupation." (Doc. 16, ¶ 34). However, there is no controlling case law or administrative guidance that supports this assertion. *See Roberts*, 945 F. Supp 2d at 1003 (stating that "there is no controlling case law or administrative guidance entitled to deference supporting plaintiff's claim that dishwashing, food preparation, kitchen and bathroom cleaning, and trash removal are *per se* beyond the acceptable universe of job duties for the tipped occupation of a server").

For example, in *Montijo v. Romulus, Inc.*, No. 14-CV-264, 2015 WL 1470128 (D. Ariz. Mar. 31, 2015), the court found the plaintiffs' claims to be both "constitutionally and statutorily meritless." *Id.* at *15. The plaintiffs in *Montijo* alleged that IHOP violated the FLSA's minimum wage provision by requiring its servers to spend a "substantial" amount of time on non-tipped duties unrelated to their occupation, while still being paid at the lower tip credit rate. *Id.* at *2-3. The duties at issue in *Montijo* included taking out the trash, scrubbing walls, cleaning the restroom and dusting. *Id.* at *1. In reaching its conclusion, the court in *Montijo* aptly noted that "a server's occupation involves side work, including the miscellaneous cleaning duties." *Id.* at *13. The performance of such side work does not transform one occupation – the server position – into two distinct occupations. *Id.* Accordingly, the court held that "IHOP [wa]s entitled to take the tip credit for the entirety of the tipped server occupation." *Id.*

In summary, the applicable law indicate that the duties performed by Plaintiffs were well within the boundaries of duties related to a tipped occupation. Furthermore, no controlling case law exists that would support Plaintiffs' vague assertions that they were required to perform tasks belonging to a different category of employment unrelated and not incidental to tipped service, or that such a category of labor exists. Accordingly, Plaintiffs' dual occupation claim must fail as a matter of law.

V. CONCLUSION

BL Restaurant respectfully requests that the Court grant its Motion for Partial Judgment on the Pleadings with respect to Plaintiffs' minimum wage claims as Plaintiffs' claims are not support by applicable law. In addition, BL Restaurant requests that it recover all of its costs incurred in defending this cause, including reasonable attorneys' fees, and that the Court grant such other relief as the Court deems just and proper.

Dated: *June 7, 2017*

JACKSON LEWIS P.C.

/s/ William Stukenberg

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Defendant's Motion for Partial Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(C) and Incorporated Memorandum* was electronically filed with the clerk of the U.S. District Court, Western District of Texas, San Antonio Division, on *June 7, 2017*, using the electronic case filing system of the court, and the electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means, as follows:

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